Supreme Court, U. S.
FILED
JUN 13 1980
MICHAEL RODAK, JR., CLERK

Supreme Court of the United States.

OCTOBER TERM, 1979.

No. **79-1962**

JOHN E. MURRAY, JR.,
PETITIONER,
v.
UNITED STATES OF AMERICA,
RESPONDENT.

Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit.

STEVEN J. BROOKS,
GLASS & BROOKS,
89 State Street,
Boston, Massachusetts 02109.
(617) 742-5350

Of Counsel:
JOHN FOSKETT.

Table of Contents

Opinions below 1

Jurisdiction 2

Questions presented 2

Constitutional provision, statutes, and administrative regulation involved 3

Statement of the case 3

Prior proceedings 4

The trial 4

Proceedings on Appeal 7

Reasons for granting the writ 10

I. A. BY MISCONSTRUING THE MEANING OF THE PHRASE "SUBSTANTIAL TRANSFORMATION" IN THE REGULATION, THE COURT OF APPEALS HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW IN A MANNER WHICH CONFLICTS WITH PRIOR DECISIONS OF THIS COURT, OF THE COURT OF CUSTOMS AND PATENT APPEALS, OF THE CUSTOMS COURT, AND OF THE UNITED STATES CUSTOMS SERVICE. ITS DECISION IS LIKELY TO CAUSE SERIOUS PRACTICAL CONSEQUENCES IN THE DAILY ADMINISTRATION OF THE UNITED STATES CUSTOMS LAWS. 10

I. B. THE COURT OF APPEALS' DECISION, DISREGARDING PRIOR AUTHORITY AND RETROACTIVELY APPLYING

ITS UNFORESEEABLE INTERPRETATION OF "SUBSTANTIAL TRANSFORMATION" TO AFFIRM PETITIONER'S CONVICTION, CONFLICTS IN PRINCIPLE WITH DECISIONS OF THIS COURT, AND SO FAR DEPARTS FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS AS TO CALL FOR AN EXERCISE OF THIS COURT'S SUPERVISORY POWER. 15

I. C. THE COURT OF APPEALS' DECISION, REFUSING TO DEFER TO RULINGS BY THE CUSTOMS SERVICE INTERPRETING "SUBSTANTIAL TRANSFORMATION" IN THE CONTEXT OF "COUNTRY OF ORIGIN," IS IN CONFLICT WITH AN APPLICABLE DECISION OF THIS COURT. 17

II. BY IMPOSING ON PETITIONER, IN HIS PROSECUTION FOR MAKING FALSE STATEMENTS, THE BURDEN OF PROVING THAT HIS STATEMENTS WERE TRUE, THE COURT OF APPEALS HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW IN A WAY WHICH CONFLICTS WITH APPLICABLE DECISIONS OF THIS COURT. 17

Conclusion. 19

Table of Authorities Cited

CASES

A.S. Beck Shoe Corp. v. United States, 70 Treas. Dec. 1009, T.D. 48724 (Cust. Ct. 1936) 11

Anheuser-Busch Brewing Association v. United States, 207 U.S. 556 (1908) 12

Bouie v. Columbia, 378 U.S. 347 (1964) 15, 16

Brinkerhoff-Faris Trust & Savings Co. v. Hill, 281 U.S. 673 (1930) 16

Chemo Puro Manufacturing Corp. v. United States, 34 Cust. Ct. 8, C.D. 1668 (1954) 12

F.W. Myers & Co., Inc. v. United States, 36 Cust. Ct. 5, C.D. 1745 (1955) 12

Hartranft v. Wiegmann, 121 U.S. 609 (1887) 12

In Re Winship, 397 U.S. 358 (1970) 18

Ishimitsu v. United States, 11 Ct. Cust. App. 186, T.D. 38963 (1921) 12

James v. United States, 366 U.S. 213 (1961) 16

Lawrence v. Allen, 48 U.S. (7 Howard) 785 (1849) 12

Leary v. United States, 395 U.S. 6 (1969) 19

Marks v. United States, 430 U.S. 188 (1977) 15, 16

Midwood Industries, Inc. v. United States, 64 Cust. Ct. 499, C.D. 4026 (1970) 12

Mullaney v. Wilbur, 421 U.S. 684 (1975) 18, 19

Parodi Erminio & Co. v. United States, 6 Cust. Ct. 288, C.D. 485 (1941) 11

Patterson v. New York, 432 U.S. 197 (1977) 18

Udall v. Tallman, 380 U.S. 1 (1965) 17

Ulster County Court v. Allen, 442 U.S. 140 (1979) 19

United States v. Critzer, 498 F.2d 1160 (4th Cir. 1974) 17

United States v. Gibson-Thomsen Co., Inc., 27 C.C.P.A. 267, C.A.D. 98 (1940) 11, 12

United States v. International Paint Co., Inc., 35 C.C.P.A. 87, C.A.D. 376 (1948) 12

United States v. Mersky, 361 U.S. 431 (1960) 19

United States v. Piascik, 559 F.2d 545 (9th Cir. 1977) cert. den. 434 U.S. 1062 (1978) 18

United States v. Samuel Dunkel & Co., Inc., 33 C.C.P.A. 60, C.A.D. 317 (1945) 12

William Camp Co. v. United States, 70 Treas. Dec. 611, T.D. 48623 (C.C.P.A. 1936) 11

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS

Fifth Amendment 15, 16, 19
Sixth Amendment 8, 9
18 U.S.C. § 2 4
18 U.S.C. § 371 4
18 U.S.C. § 542 4, 17, 18
18 U.S.C. § 551 4
Tariff Schedules of the United States, 19 U.S.C.
§ 1202 10, 12
19 U.S.C. § 1304 11, 13
19 U.S.C. § 1313(a) 12
19 U.S.C. § 1592 14
Customs Regulations, 19 C.F.R. §§ 134.0, 134.1(b)
4, 6, 7, 9, 10, 13, 16, 17, 18

ADMINISTRATIVE RULINGS

61 Treas. Dec. 873, T.D. 45611(19) (1932) 11
61 Treas. Dec. 919, T.D. 45623(2) (1932) 11
68 Treas. Dec. 428, T.D. 47946(6) (1935) 11
70 Treas. Dec. 235, T.D. 48493(5) (1936) 11
95 Treas. Dec. 214, T.D. 55108(2) (1960) 11
T.D. 78-202, 12 Cust. Bull., July 12, 1978 11
T.D. 78-418, 12 Cust. Bull., Nov. 22, 1978 11
86 Treas. Dec. 300, T.D. 52788 (1951) 12
C.S.D. 79-349, 13 Customs Bull., Oct. 31, 1979 11
C.S.D. 79-312, 13 Customs Bull., Sept. 12, 1979 11

MISCELLANEOUS

Hall, General Principles of Criminal Law (2d ed. 1960) 16

Supreme Court of the United States.

OCTOBER TERM, 1979.

No.

JOHN E. MURRAY, JR.,
PETITIONER,

v.

UNITED STATES OF AMERICA,
RESPONDENT.

Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit.

Petitioner John E. Murray, Jr. prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the First Circuit, which was entered in this case on May 15, 1980.

Opinions Below

The text of the opinion of the Court of Appeals in this case is reprinted at App. 1-14, hereto. The opinion is not yet reported in the Federal Reporter, 2d Series. The text of the judgment of the Court of Appeals is reprinted at App. 15, hereto. The trial in the United States District Court for the District of Massachusetts was by jury, and no opinion was filed by the District Court. The text of the judgment of the District Court is reprinted at App. 16, hereto.

Jurisdiction

The judgment of the Court of Appeals was entered on May 15, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and Supreme Court Rule 22(2).

Questions Presented

I. Did The Court of Appeals Commit Error by (1) Holding, Contrary to All Prior Law, That Whether or Not an Article Has Undergone "Substantial Transformation," Which by Customs Regulation 19 C.F.R. § 134.1(b) Determines an Article's "Country of Origin," Depends Solely on Changes in the Article's Economic Value Rather Than in Its Physical Characteristics, and (2) by Retroactively Applying This Novel Interpretation of the Regulation so as to Affirm Petitioner's Conviction for Falsely Stating on Customs Forms that Holland, rather than China, was the "Country of Origin" of Certain Animal Glue?

II. In His Prosecution Under 18 U.S.C. § 542 for Importing Animal Glue by Means of False Statements That Its Country of Origin is Holland, Once the Government Has Presented Evidence That It Was Originally Produced in China, Does 19 C.F.R. § 134.1(b) Shift the Burden of Proof Onto Petitioner to Prove That the Glue Was "Substantially Transformed" in Holland, and Therefore That His Statements Were True?

Constitutional Provisions, Statutes and Administrative Regulation Involved

CONSTITUTION OF THE UNITED STATES

AMENDMENT V

"No person shall . . . be deprived of life, liberty, or property, without due process of law . . . ."

All but the last of the following statutes and regulation are set out in the appendix, in pertinent parts, due to their length (App. 17-23, et. seq.):

18 U.S.C. § 2
18 U.S.C. § 371
18 U.S.C. § 542
18 U.S.C. § 551
Tariff Schedules of the United States, 19 U.S.C. § 1202
19 U.S.C. § 1304

Customs Regulations, 19 C.F.R. § 134.1(b):

"'Country of origin' means the country of manufacture, production, or growth of any article of foreign origin entering the United States. Further work or material added to an article in another country must effect a substantial transformation in order to render such other country the 'country of origin' within the meaning of this part."

Statement of the Case

Petitioner seeks a writ of certiorari to review the judgment of the United States Court of Appeals for the First

Circuit, entered on May 15, 1980, affirming his conviction. The District Court had jurisdiction over the offenses described in 18 U.S.C. §§ 2, 371, 542, and 551.

Prior Proceedings

A twenty-two count indictment was returned against petitioner (see App. 4, n. 2, for the Court of Appeals' explanation of the indictment's history.) Count 1 alleged that Petitioner conspired with others to defraud the United States Customs Service, in violation of 18 U.S.C. § 371; to knowingly import Chinese animal glue into the United States by means of false statements, namely, that Holland was its country of origin, in violation of 18 U.S.C. § 542; and to knowingly conceal documents for the purpose of suppressing evidence of fraud against the Customs Service, in violation of 18 U.S.C. § 551. Counts 2-22 each charged that Petitioner willfully imported such glue into the United States by means of statements which were false and fraudulent in that they did not state the proper dutiable entered value and country of origin of the glue, in violation of § 542. Under Customs Regulation 19 C.F.R. § 134.1(b) ("the Regulation"), the term "country of origin" is defined as follows:

> "'Country of origin' means the country of manufacture, production, or growth of an article of foreign origin entering the United States. Further work or material added to an article in another country must effect a substantial transformation in order to render such other country the 'country of origin' within the meaning of this part."

The Trial

After a trial by jury in the District Court, Petitioner was convicted upon all twenty-two counts of the indictment. Petitioner was sentenced to a term of two years, the first six months to be served in jail and the balance suspended

with probation for two years. Petitioner was also ordered to pay a fine of $20,000. Execution of sentence was stayed pending appeal.

At trial, there was evidence of the following:

Nicholson and Company, Inc. ("Nicholson") was an importer of animal glue with headquarters in Cambridge, Massachusetts. During the period 1972-1975, Petitioner was Nicholson's vice-president and chief executive officer. Petitioner's father, John Murray, Sr., was president of the company. Petitioner's nephew, indicted co-conspirator Stephen P. Hopkins, was also a vice-president. N.V. Lijmfabriek C. Trommelen ("the Trommelen Company") was a dealer and manufacturer of animal glue with headquarters in Dongen, Holland. The Trommelen Company's manager was co-conspirator Bas Trommelen.

At trial, the Government attempted to prove that Petitioner caused Nicholson to import animal glue into the United States from Holland, by means of two categories of false statements, i.e., falsely stating the glue's "country of origin" as Holland, rather than the Peoples Republic of China, and falsely stating its dutiable entered value by omitting therefrom certain payments which Nicholson made to Bas Trommelen individually.

The Government attempted to prove that Petitioner, Bas Trommelen, Hopkins, and others entered into a plan under which Nicholson bought Chinese glue in Europe from European brokers; purported to sell it to the Trommelen Company in Holland; arranged for the Trommelen Company to rebag the glue at its plant; arranged for the Trommelen Company to resell the glue to Nicholson at the same price, increased only by charges attributable to rebagging, trucking, and loss of interest on the money it had

paid to Nicholson; and imported the glue into the United States by stating on Customs Forms 5515 ("Special Customs Invoice") and 7501-B ("Consumption Entry") that its country of origin was Holland. (The Government also attempted to prove that Nicholson paid individual commissions to Bas Trommelen on this glue, and imported it by stating on the Customs forms its dutiable entered value as an amount excluding these payments.) The Government attempted to prove that Petitioner's purpose was to take advantage of the lower duty rates applicable to products of Holland, and avoid the higher duty rates applicable to those of China. The Court of Appeals, in its opinion, has set forth the evidence in greater detail, and Petitioner respectfully refers this Court to that opinion (App. 5-6).

The Government's evidence at trial consisted primarily of the testimony of Bas Trommelen, business records of Nicholson, and documents submitted to the Customs Service. The Government claimed, and its evidence tended to show, that nothing was done to the glue in Holland by the Trommelen Company other than rebagging, leaving unaltered its physical characteristics, and that it therefore was not "substantially transformed" in Holland within the meaning of the Regulation, so that its true "country of origin" was China. On the other hand, there was also evidence at trial which, if believed, tended to show that, in Holland, the Trommelen Company blended, ground, screened, and defoamed the raw, crude Chinese glue purchased by it from Nicholson (a processor's good), thereby changing its physical character so that it became a new product with a new use, a commercial adhesive (a consumer's good). Petitioner contended that the glue had therefore been "substantially transformed" (within the meaning of the Regulation) in Holland by the Trommelen Company, making Holland its

country of origin. (There was also evidence, if believed, tending to show that the payments to Bas Trommelen were made by Nicholson to obtain his services in securing the Trommelen Company as an exclusive source of supply for Nicholson during a period of world-wide glue shortage.)

As noted, Petitioner was convicted by a jury upon all twenty-two counts of the indictment. Hopkins was acquitted by the jury upon all twenty-two counts.

Proceedings on Appeal

On appeal, as at trial, the dispute between Petitioner and the Government centered on whether or not the Trommelen Company had "substantially transformed" the glue in Holland by changing its physical characteristics. Petitioner argued that the District Court committed four errors:

(1) By not dismissing the indictment, because the phrase "substantial transformation" in the Regulation is void for vagueness, in that it does not adequately define what changes in the physical identity of animal glue are sufficient to make the countr of processing its "country of origin." The Government argued that, as applied to physical changes in animal glue, the language passes Constitutional muster.

(2) By failing to define the term "substantial transformation" in its instructions to the jury. Petitioner claimed that the District Court should have adopted his requests of charge (which were, in effect, that the jury must determine whether the animal glue, by virtue of work performed on it in Holland, had been altered physically so that it became a new product with a new use). The Government argued that the District Court adequately conveyed to the jury the level of required physical change.

(3) By improperly restricting Petitioner's cross-examination of the key prosecution witness, Bas Trommelen. Petitioner argued that his Sixth Amendment rights had been violated because the District Court did not allow him to question Trommelen with respect to whether or not some of the Chinese animal glue purchased by the Trommelen Company from Nicholson had been re-exported by it to non-European Economic Community nations, contrary both to Trommelen's representations on Dutch Customs forms (by which he obtained duty "drawbacks" on the glue) and to Dutch law. Petitioner argued that he was prejudiced because the District Court prevented him from establishing the present financial motive of the key prosecution witness to lie concerning the crucial issue of "substantial transformation." Petitioner argued that the Court's ruling also prevented him from establishing that, because some of the Chinese glue had been re-exported, the Trommelen Company necessarily blended Dutch glue with the Chinese glue in order to meet its poundage commitments to Nicholson, thereby substantially transforming it. The Government argued that the District Court properly exercised its discretion.

(4) By denying Petitioner's motions for judgment of acquittal as to the Government's alternative theory of false statements, because the fact that the payments to Bas Trommelen individually never inured in any way to the Trommelen Company meant that they were not part of the glue's dutiable value. The Government argued that such payments were dutiable.

The Court of Appeals dealt only with point (1). In doing so, it ignored the contentions repeatedly argued by both sides at trial, in their briefs, and in oral argument, viz., whether "substantial transformation" is unconstitutionally

vague as a definition of those changes in an article's *physical* characteristics which determine its "country of origin." Instead, the Court held, for the first time, that the Regulation requires a change in the article's *economic value,* not its physical character, and that this change, effected by labor performed on it, must be "significant." (App. 9-10). The Court therefore held that "substantial transformation," so construed, was not unconstitutionally vague. (App. 12). Holding further that the Regulation imposed the burden on Petitioner to prove, in his trial for falsely stating the "country of origin" as Holland, that the glue had been "substantially transformed" in Holland (App. 12, n. 7), the Court found that Petitioner had not met his burden. It stated that the District Court should have instructed the jury that, if it found the glue was "originally manufactured" in China, Petitioner's statements as to "country of origin" were false (App. 13). Having so interpreted the Regulation, the Court held that it need not reach Petitioner's argument concerning the jury instructions (App. 13). The Court of Appeals also held that, since Petitioner did not claim that he wished to cross-examine Bas Trommelen as to what *economic value* was added to the glue in Holland, his Sixth Amendment argument must fail (App. 13); and, finally, that, since the indictment was framed to charge false statements concerning "country of origin" conjunctively with false statements concerning dutiable value, the Court need not consider Petitioner's argument on the latter (App. 14).

Petitioner's argument to this Court is that the Court of Appeals decided the "substantial transformation" question on wholly novel — and erroneous — grounds, causing it likewise erroneously to resolve the Sixth Amendment issue, and erroneously to refuse to deal with the issues as to

jury instructions and motions for acquittal. The reasons why this Court should review the Court of Appeals' judgment in resolving the "substantial transformation" issue wholly on economic grounds are set forth below.

Reasons for Granting the Writ

I A. By Misconstruing the Meaning of the Phrase "Substantial Transformation" in the Regulation, the Court of Appeals has Decided an Important Question of Federal Law in a Manner which Conflicts with Prior Decisions of this Court, of the Court of Customs and Patent Appeals, of the Customs Court, and of the United States Customs Service. Its Decision is Likely to Cause Serious Practical Consequences in the Daily Administration of the United States Customs Laws.

The Court of Appeals held that the term in the Regulation "substantial transformation", defining what level of manufacturing processes determine an article's "country of origin," ". . . is to be measured with reference to economic value, and the degree must be very great" (App. 9). The Court, relying on the Regulation's intended purpose to implement the Tariff Act and Schedules (App. 7), held that "substantial transformation" does *not* concern physical changes which result from added labor — apparently, no matter how drastic such changes might be (App. 13). The Court of Appeal's holding that change in economic value is the sole determinant of "substantial transformation" conflicts with all relevant authority, including decisions by this Court, to the effect that, where work performed on an article effects a statutorily significant change under the Tariff Act, the proper inquiry is whether the article has been changed with respect to its *physical* char-

acteristics and its function. Most often, this inquiry is expressed in terms of whether processing has resulted in a product with a new name, character, or use.

Decisions determining the adequacy of marking of "country of origin" pursuant to 19 U.S.C. § 1304 have long held that the concept of "substantial transformation" is concerned with changes in an article's physical characteristics. See *Parodi Erminio & Co. v. United States,* 6 Cust. Ct. 288, 290, C.D. 485 (1941); C.S.D. 79-349, 13 Customs Bull., Oct. 31, 1979 at p. 21; 61 Treas. Dec. 873, T.D. 45611(19) (1932); 61 Treas. Dec. 919, T.D. 45623(2) (1932); 68 Treas. Dec. 428, T.D. 47946(6) (1935); 70 Treas. Dec. 235, T.D. 48493(5) (1936); 95 Treas. Dec. 214, T.D. 55108(2) (1960); *A.S. Beck Shoe Corp. v. United States,* 70 Treas. Dec. 1009, 1010-1011, T.D. 48724 (Cust. Ct. 1936); *William Camp Co. v. United States,* 70 Treas. Dec. 611, 614, T.D. 48623 (C.C.P.A. 1936). See also T.D. 78-202, 12 Customs Bull., July 12, 1978 at pp. 4-7, questioning the applicability of "substantial transformation" to determinations of duty rate, but holding that, in any event, the operative inquiry is whether a "new and different article with a distinctive name, character, or use" results.

Administrative decisions interpreting "substantial transformation," as applied to the Generalized System of Preferences, also show that physical changes are dispositive. T.D. 78-418, 12 Customs Bull., Nov. 22, 1978 at p. 11; C.S.D. 79-312, 13 Customs Bull., Sept. 12, 1979 at p. 36.

To the same effect are cases determining whether an importer has sufficiently processed an imported article such that he is its "ultimate purchaser," thereby permitting eradication of its "country of origin" markings. *United*

States v. Gibson-Thomsen Co., Inc., 27 C.C.P.A. 267, 273, C.A.D. 98 (1940); *Midwood Industries, Inc. v. United States*, 64 Cust. Ct. 499, 507, C.D. 4026 (1970).

Cases determining whether a product has been sufficiently processed in a non-communist country so as to remove it from the coverage of 86 Treas. Dec. 300, T.D. 52788 (1951), entitling it to a lower duty rate, also turn on whether labor added to the product has sufficiently changed its physical characteristics. *Chemo Puro Manufacturing Corp. v. United States*, 34 Cust. Ct. 8, 11, C.D. 1668 (1954); *F.W. Myers & Co., Inc. v. United States*, 36 Cust. Ct. 5, 5-6, C.D. 1745 (1955).

See also those decisions determining whether an article has been "manufactured" in the United States prior to re-export, within the meaning of the drawback statute, 19 U.S.C. § 1313(a) and its predecessors, *Anheuser-Busch Brewing Association v. United States*, 207 U.S. 556, 562 (1908); *United States v. International Paint Co., Inc*, 35 C.C.P.A. 87, 93-94, C.A.D. 376 (1948); *United States v. Samuel Dunkel & Co., Inc.*, 33 C.C.P.A. 60, 63, 65, C.A.D. 317 (1945); and see those decisions determining whether an article has been "manufactured" so as to place it within one classification rather than another under the Tariff Schedules, *Hartranft v. Wiegmann*, 121 U.S. 609, 615 (1887); *Ishimitsu v. United States*, 11 Ct. Cust. App. 186, 191, T.D. 38963 (1921). See also, *Lawrence v. Allen*, 48 U.S. (7 Howard) 785, 793-794 (1849).

All these decisions cited above have two things in common: In all, the focus is clearly on *physical* changes resulting from the added work. And in none is there any indication that the determinative inquiry is whether the added work has effected a change in the article's economic value.

To Petitioner's knowledge, the Court of Appeals' decision is the first time that such a standard has been imposed or even suggested. As the above-cited decisions and rulings show, the Regulation's "declared purpose", relied on by the Court (App. 7), does not support its conclusion that "substantial transformation" is to be equated with an increase in economic value. It follows that the Court's opinion is reduced to reliance on a sixth usage of the word "substantial," as defined in one general purpose dictionary (App. 9). This is insufficient authority for rejecting long-standing and consistent precedent. The Court's conclusion makes the fundamentally unsound assumption that change in an article's economic value is necessarily, and directly, correlated to labor performed on it. Such an analysis ignores the many *extrinsic* factors which can affect value, such as economic conditions in the country of processing, changes in demand, changes in fashion, availability and cost of transport, and currency differentials. The Court's opinion thus misconstrues the connection between labor and change which is implicit in the Regulation's language.

The Court of Appeals' misreading of "substantial transformation" is a drastic alteration of a fundamental concept of Customs law which is likely to have serious practical consequences. Currently, imported articles must be clearly marked with their "country of origin," under 19 U.S.C. § 1304(a) (the only exceptions being those articles exempted pursuant to that provision). Moreover, Customs Forms, which must be submitted by importers to the Customs Service upon entry of merchandise, require an importer to state thereon, and certify as true, the "country of origin" as defined by "substantial transformation". The Court of Appeals' holding not only changes the ground rules under which these activities have taken place, but it does so with

dangerous inexactness, couched in terms like "significant" and "very great" increases in economic value. The Court of Appeals has left it to appraisers and importers to resolve, unaided, how much is "significant;" when changes in economic value are measured; how they are measured (e.g., to what extent, and how, must an importer or appraiser try to separate economic value attributable to "labor" from that attributable to other factors?) The Court's decision virtually guarantees serious disagreements between Customs appraisers and importers as to the correctness of markings and statements of "country of origin." The net result can only be unwarranted penalty proceedings and, ultimately, review in the federal courts under 19 U.S.C. § 1592, as amended.

Moreover, the new standard devised by the Court of Appeals imposes an unacceptable burden on importers who, after all, are *required* to make statements as to "country of origin." Its subjects them unnecessarily, and unfairly, to fear of civil penalties or forfeiture, and of criminal prosecution. As a consequence, importers are more likely to adopt what now becomes the only safe course — to seek advance rulings on their countless importations, unnecessarily diverting their attention and that of the Customs Service from other business.

Moreover, the Court's decision may amount to judicial alteration of the duty rates applicable to some products, imposing a serious financial burden on importers. Particularly affected would be those products a large percentage of the value of which is attributable to raw material, but whose physical identity is totally altered by inexpensive foreign labor. This is an economic burden not countenanced until now. It is equally likely to produce disagreement between appraisers and importers, leading to needless protest

actions in the Customs Court seeking resolution anew of what was, until now, a settled issue. Petitioner submits that a complete departure from prior law which will have these, and perhaps other unforeseeable, administrative, judicial, and economic consequences, is a proper subject for review by this Court.

I B. The Court of Appeals' Decision, Disregarding Prior Authority and Retroactively Applying Its Unforeseeable Interpretation of "Substantial Transformation" so as to Affirm Petitioner's Conviction, Conflicts in Principle with Decisions of this Court, and so far Departs from the Accepted and Usual Course of Judicial Proceedings as to Call for an Exercise of this Court's Supervisory Power.

The Court of Appeals' holding that economic, not physical, changes in a product determine its country of origin is an unforeseeable and unexpected judicial construction in light of all prior law. (Indeed, the words "substantial transformation," standing alone, lend themselves far more readily to the concept of physical change than to that of change in economic value.) As such, the Court's retroactive application of its construction to Petitioner in this criminal prosecution violates his Fifth Amendment due process rights and conflicts in principle with this Court's decisions in *Marks v. United States,* 430 U.S. 188 (1977) and *Bouie v. Columbia,* 378 U.S. 347 (1964). Although *Bouie* involved a state court's statutory construction which was unexpected in light of the statute's "narrow and precise" language, 378 U.S. at 351, its holding was meant to govern retroactively-applied decisions unforeseeable in light of prior judicial interpretations as well — "If a judicial construction of a criminal statute is unexpected and indefensible by

reference to the *law* which had been *expressed* prior to the conduct in issue, it must not be given retroactive effect," 378 U.S. at 354, quoting Hall, General Principles of Criminal Law (2d ed. 1960) [emphasis added]. See *Brinkerhoff-Faris Trust & Savings Co. v. Hill,* 281 U.S. 673, 678-680 (1930), cited approvingly in *Bouie* at 378 U.S. 354. *Marks* made it plain that, where statutory language has been construed by a court, due process precludes retroactive application of a subsequent unforeseeable construction to a defendant in a criminal case. 430 U.S. at 195. The fact that *Marks* involved a statute restricting First Amendment rights, 430 U.S. at 196, does not distinguish it since *Marks* clearly turned on due process grounds, 430 U.S. at 191-192. See also *James v. United States,* 366 U.S. 213, 221-222 (1961). The Court of Appeals itself unintentionally noted the effects of its unforeseeable ruling on Petitioner's due process rights. Thus, (even beyond the fact that Petitioner could have had no warning of this construction at the time of his conduct), the Court pointed out that, at trial, Petitioner introduced ". . . no evidence that while [the glue] was in Holland the glue had increased in value by any particular percentage or amount, . . ." (App. 12), and that Petitioner "did not claim at the trial court or here that he wished to cross-examine the witness on the vital question as to what economic value was added to the glue . . ." (App. 13). Had Petitioner sought to do so, however, he might properly have been precluded by the District Court because the law, until retroactively changed by the Court of Appeals, was that physical, not economic, change governed.

The Fifth Amendment due process interests affected by this unforeseeable alteration of governing law are particularly important here, a case which involves the novel use of 19 C.F.R. § 134.1(b) as the basis for a criminal prosecu-

tion under § 542. "[P]ioneering interpretations of the [customs] law should not be sought or rendered in criminal prosecutions . . . but rather in civil suits . . .," see *United States v. Critzer,* 498 F.2d 1160, 1163 (4th Cir. 1974).

I. C. The Court of Appeals, by Refusing to Defer to Rulings of the Customs Service Interpreting "Substantial Transformation" in the Context of "Country of Origin," is in Conflict with an Applicable Decision of this Court.

The Court of Appeals noted that Customs Service Rulings "may not be consistent with our interpretation of the subterm 'substantial information [sic] . . .'" (App. 10) but held that it was not obligated to defer to such rulings. Petitioner submits that a long series of published rulings by the Customs Service clearly have turned on the issue of physical change. They are not plainly erroneous or inconsistent with the Regulation. As the agency's construction of a relevant statute, they would be entitled to "great deference," *Udall v. Tallman,* 380 U.S. 1, 16 (1965). As its construction of regulatory language wholly of its own design, "deference is even more clearly in order." *Ibid.,* at 16-17. The Court of Appeals' ruling not only conflicts with *Udall,* but jeopardizes the significant interests which importers have in relying upon prior determinations by the Customs Service, and sanctions unwarranted interference by the federal courts in its daily administration of the Customs laws.

II. By Imposing on Petitioner, in His Prosecution for Making False Statements, the Burden of Proving that His Statements as to Country of Origin were True, the Court of Appeals has Decided an Important Question of Federal Law in a way Which Conflicts with Applicable Decisions of this Court.

This Court has squarely held that ". . . the Due Process Clause requires the prosecution to prove beyond a reasonable doubt all of the elements included in the definition of the offense of which the defendant is charged." *Patterson v. New York*, 432 U.S. 197, 210 (1977). See *In Re Winship*, 397 U.S. 358, 375 (1970); *Mullaney v. Wilbur*, 421 U.S. 684, 704 (1975). Petitioner was charged with violations of 18 U.S.C. § 542. One of the required elements of the crime defined in that statute is that Petitioner made statements which were false. See *United States v. Piascik*, 559 F.2d 545, 551, (9th Cir. 1977) *cert. den.* 434 U.S. 1062 (1978). Couched in terms of § 542 and the indictment, therefore, this Court's decisions require the Government to prove beyond a reasonable doubt that China was the country of origin of the glue, and not Holland. Indeed, this was acknowledge by the Court of Appeals in its opinion (App. 12, n. 7). But that Court, relying on the language in the Regulation, held that the Government, by showing that the glue was originally manufactured in China, shifts the burden of proof to Petitioner with respect to this issue:

> "The Government has borne the burden of going forward when it has shown that the glue was manufactured in China. When defendant claims that his glue falls within the exception because in Holland it underwent 'substantial transformation,' he has the burden of *proving* such 'substantial transformation' because in effect he is alleging that the glue comes within an exception."
>
> App. 12, n. 7. [emphasis added]

In no sense does this language create an "affirmative defense," "an exculpatory or mitigating circumstance affecting the degree of culpability or the severity of punishment . . .," *Patterson, supra*, at 207, 210, nor did the Court

of Appeals so read it. Instead, the Court required Petitioner to prove "the critical fact in dispute," *i.e.*, that the glue had undergone a "substantial transformation" in Holland. This burden-shifting deprived Petitioner of his due process rights, in direct conflict with decisions of this Court, *Mullaney, supra,* at 701.[1/]

Conclusion

For the reasons stated, the petition for a writ of certiorari to the United States Court of Appeals for the First Circuit should be granted.

Respectfully submitted,

STEVEN J. BROOKS
GLASS & BROOKS
89 State Street
Boston, Massachusetts 02109
(617) 742-5350
Attorney for John E. Murray, Jr.

Of Counsel:
JOHN FOSKETT.

[1/] A strained reading of the Court of Appeals' opinion, relying solely on its statement that Petitioner produced "no evidence" (App. 12) of change in economic value, might permit the conclusion that it created a mandatory presumption shifting only the burden of producing evidence, not of proof. This, of course, ignores the Court's express language (App. 12, n. 7). Even if so read, however, its holding raises a significant question of Fifth Amendment due process rights which ought to be settled by this Court. See this Court's characterization of such a presumption as "a far more troublesome evidentiary device, . . ." *Ulster County Court v. Allen,* 442 U.S. 140, 157 (1979) (a case sustaining a "permissive" presumption.) See also *Leary v. United States,* 395 U.S. 6, 36, n. 64 (1969). The question calls particularly for this Court's resolution since any mandatory presumption involved here derives from an administrative regulation which contains not the least indication that it is intended to govern the admission or weight of evidence in criminal cases in the federal courts, see *United States v. Mersky,* 361 U.S. 431, 441 (1960), even if it properly *could* do so.